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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE HIGH-TECH EMPLOYEE ANTITRUST LITIGATION	Master Docket No. 11-CV-2509-LHK
THIS DOCUMENT RELATES TO: ALL ACTIONS	**DEFENDANTS' REPLY IN SUPPORT OF JOINT MOTION TO DISMISS THE CONSOLIDATED AMENDED COMPLAINT** **ORAL ARGUMENT REQUESTED** DATE: January 26, 2012 TIME: 1:30 pm COURTROOM: Courtroom 8, 4th Floor JUDGE: Honorable Lucy H. Koh

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

INTRODUCTION

Plaintiffs' opposition brief essentially concedes that their claim of an overarching conspiracy—what this Court termed the "motherlode conspiracy"—is nothing more than a patchwork of separate alleged bilateral agreements. Plaintiffs made the strategic decision to try to lump all Defendants together into this "single conspiracy" (Opp. at 12) so that Defendants would each be jointly and severally liable for alleged agreements that have nothing to do with them. Having decided to pursue a "single conspiracy" claim (Opp. at 12), that is the claim that must be tested under *Twombly*. Because Plaintiffs allege no evidentiary facts that plausibly suggest a single conspiracy, *Twombly* requires that their antitrust claims be dismissed.

Plaintiffs argue that their overarching conspiracy claim should nonetheless stand because these alleged bilateral agreements were supposedly "identical, interconnected, and operated over the same time period." (Opp. at 10.) This is just the kind of conclusory labeling, unsupported by evidentiary facts, that *Twombly* rejected. Plaintiffs' boilerplate, repetitive description of the alleged agreements is so lacking in detail that no conclusion can be drawn about their actual degree of similarity. And where Plaintiffs do provide additional detail (as with the alleged Pixar/Lucasfilm agreement), that detail shows that the alleged agreement was very different from any of the others. Plaintiffs' allegations likewise make clear that, rather than covering the same time period, the alleged agreements were entered at different times and covered different periods.

But Plaintiffs' allegations fail for the more fundamental reason that courts have repeatedly held that allegations of facially similar conduct raise no inference of conspiracy. Companies in competitive markets frequently engage in broadly similar conduct. To rely on supposedly similar conduct, Plaintiffs must allege facts showing that the companies would not rationally engage in such conduct absent a conspiracy. Plaintiffs allege no such facts here. Nor could they. There are numerous legitimate reasons why companies would decide to limit their methods of recruiting from other companies, as recognized in the provisions of the DOJ consent decree permitting such agreements in a variety of circumstances. It therefore makes no difference that the supposedly parallel conduct is a series of alleged bilateral agreements. Plaintiffs allege nothing to show that the alleged bilateral agreements are connected in any way. For example, Plaintiffs allege nothing

to show that Lucasfilm, which allegedly agreed not to cold call employees at Pixar, had any knowledge of or interest in, or even could benefit from, any alleged non-solicitation agreement between Intel and Google.

Plaintiffs suggest at times that their Complaint should stand if they have alleged at least some kind of antitrust claim against each Defendant. (Opp. at 1.) This argument fundamentally misconstrues *Twombly* and the critical difference between a series of bilateral agreements and an overarching conspiracy. In the absence of sufficient evidentiary allegations of a single overarching conspiracy, there is no basis to hold Intuit, for example, liable based on an alleged agreement between Adobe and Apple, or to hold Apple liable based on an alleged agreement between Google and Intel. For tactical reasons alone, Plaintiffs chose to allege that disconnected alleged agreements among the Defendants are part of a single antitrust conspiracy. That is the antitrust conspiracy claim the Court must evaluate here.

Plaintiffs devote a significant portion of their Opposition to arguing that non-solicitation agreements are per se violations. This argument is both irrelevant and wrong as a matter of law. It is irrelevant because the existence of a conspiracy is a threshold requirement, and the conspiracy that Plaintiffs have alleged—a "single conspiracy" among these seven Defendants—fails for lack of factual allegations regardless of how it is labeled. It is wrong because every court that has addressed the issue has concluded that non-solicitation agreements are treated under the rule of reason, not as per se violations.

Plaintiffs' antitrust claims also fail because they have alleged no plausible facts to show how they could have been injured by the purported "overarching conspiracy" or even the alleged bilateral agreements. The *Twombly* requirement to allege evidentiary facts applies with equal force to the element of antitrust injury as it does to the element of conspiracy. Plaintiffs have not alleged any specific injury they suffered caused by any alleged conspiracy. Nor have they alleged any plausible theory to support a market-wide impact that affected their salaries. This failure is not accidental; there is no plausible labor market that Defendants collectively control that would give them even the possibility of affecting salaries on a market-wide basis.

Plaintiffs' § 16600 claim should be dismissed because § 16600 does not reach non-

solicitation agreements involving employees. Plaintiffs cite cases to show that § 16600 has been applied to agreements involving non-solicitation of clients and non-hiring of employees, but those cases are irrelevant here because Plaintiffs' allegations involve non-solicitation of employees. The law uniformly holds that such agreements do not violate § 16600.

Finally, Plaintiffs' § 17200 claim also should be dismissed. Plaintiffs do not contend that the "fraudulent" prong of § 17200 applies, and they concede that their § 17200 claim premised on "unlawful" conduct fails if their other claims fail. They argue that their "unfair" claim should survive even if their antitrust claims fail, but they ignore the many decisions—including one from this Court—which have held that a plaintiff cannot save a failed antitrust conspiracy claim by alleging that the same conduct was "unfair" under the UCL.

ARGUMENT

I. PLAINTIFFS' ANTITRUST CLAIMS SHOULD BE DISMISSED.

A. Plaintiffs' "Notice Pleading" Standard Is Not the Law.

The Ninth Circuit has held that "[a]t least for the purposes of adequate pleading in antitrust cases, the [Supreme] Court specifically abrogated the usual 'notice pleading' rule, found in Federal Rule of Civil Procedure 8(a)(2)." *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 n.5 (9th Cir. 2008) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 561 (2007)). Plaintiffs ignore this precedent. They argue that as long as Defendants have notice of the claim against them, their antitrust allegations should stand because "[t]here are no special pleading standards for antitrust cases." (Opp. at 7.) Plaintiffs cite fifteen cases supposedly relating to pleading standards, but fail even to mention *Kendall*, the leading Ninth Circuit decision. (Opp. at 7-8.) *Kendall* held that an antitrust conspiracy claim requires *evidentiary facts* that support a plausible conspiracy. *Kendall*, 518 F.3d at 1047 (plaintiffs must "plead not just ultimate facts (such as a conspiracy), but evidentiary facts which, if true, will prove" the alleged antitrust violation); *see also Twombly*, 550 U.S. at 555 ("[f]actual allegations must be enough to raise a right to relief above the speculative level"); *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009) (plaintiffs must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged").

B. Plaintiffs Have Identified No Evidentiary Facts to Support the Only Claim They Allege—an "Overarching," Multilateral Conspiracy.

Plaintiffs allege no facts plausibly supporting an overarching conspiracy. Nothing in the Complaint suggests that any Defendant had an interest in any alleged agreement other than its own. Plaintiffs allege no evidence of any coordination of any one pair of companies with any other pair, and no communications that even *hint* at an overarching conspiracy. Plaintiffs admit that the "single conspiracy" they allege left Defendants free to cold call most of the other Defendants' employees. (Opp. at 12.) In other words, Defendants supposedly reached a single agreement to use non-solicitation agreements "to fix and suppress the compensation of their employees," but did so in a way that allowed Defendants to do most of the time exactly what the agreement supposedly prohibited. The lack of any evidentiary allegations supporting an overarching conspiracy, combined with the incoherence of how Plaintiffs allege it functioned, renders Plaintiffs' effort to turn the alleged bilateral agreements into a single overarching conspiracy "implausible." *Kendall*, 518 F.3d at 1047; *see also William O. Gilley Enters. v. Atl. Richfield Co.*, 588 F.3d 659, 662 (9th Cir. 2009) ("on a motion to dismiss in an antitrust case, a court must determine whether an antitrust claim is 'plausible' in light of basic economic principles" and common sense).[1]

Plaintiffs' primary argument is that an overall conspiracy may be inferred because the alleged bilateral agreements were supposedly "identical." (Opp. at 10.) But this is just the kind of unsupported, conclusory allegation that *Twombly* rejects. Plaintiffs' assertion fails at the outset based on their concession (Opp. at 12 n.8) that the alleged agreement between Pixar and Lucasfilm is different in significant respects from any of the other agreements. (*Compare* Compl. ¶¶ 59-61 (Pixar/Lucasfilm) *with, e.g.*, ¶ 73 (Apple/Adobe), ¶ 98 (Google/Intel).) And the other alleged bilateral agreements are described so generically that it is not possible to draw any meaningful conclusion about whether they are actually similar at all. (*E.g.*, Compl. ¶ 73 (alleging

[1] Defendants do not concede the existence of the bilateral agreements alleged in the Complaint. However, the Court need not decide whether the bilateral agreements have been pleaded with sufficient specificity because Plaintiffs' antitrust claims are predicated on a single, overarching conspiracy—not simply a series of bilateral agreements.

agreement between Apple and Adobe "not to cold call each other's employees"), ¶ 79 (alleging agreement between Google and Intel "not to cold call each other's employees").)

But even if Plaintiffs had adequately alleged agreements that were broadly similar, the existence of facially similar agreements between different pairs of companies is not alone sufficient to allege a single agreement among all such companies. *See In re Iowa Ready-Mix Concrete Antitrust Litig.*, 768 F. Supp. 2d 961, 972-75 (N.D. Iowa 2011); *In re Late Fee & Over-Limit Fee Litig.*, 528 F. Supp. 2d 953, 961-63 (N.D. Cal. 2007) (parallel actions taken at the same time do not by themselves raise an inference of a conspiracy). Courts have allowed parallel conduct to support an inference of conspiracy only when such parallel conduct would not be rational in the absence of a conspiracy. *Twombly*, 550 U.S. at 556 n.4 (holding insufficient allegations that defendants each decided not to enter each other's incumbent territories because plaintiffs alleged no facts showing that those decisions were independently irrational). For example, in *In re Text Messaging Antitrust Litigation*, 630 F.3d 622 (7th Cir. 2010), the court inferred a conspiracy from parallel pricing behavior based in large part on the allegation that "in the face of steeply falling costs, the defendants increased their prices." *Id*. at 628. This kind of "anomalous behavior," along with other factors, supported the inference that the price increases were the result of collusive behavior. *Id. See also Starr v. Sony BMG Music Entm't*, 592 F.3d 314, 327 (2d Cir. 2010) (upholding antitrust complaint where "plaintiffs have alleged behavior that would plausibly contravene each defendant's self-interest in the absence of similar behavior by rivals"); *In re Graphics Processing Units Antitrust Litig.*, 540 F. Supp. 2d 1085, 1095 (N.D. Cal. 2007) (denying motion to dismiss where alleged behavior was not economically rational on its own or in defendants' independent self-interest).

Here, Plaintiffs allege no behavior that is irrational or so contrary to self-interest to raise an inference of a broader conspiracy. Quite to the contrary. There are obvious legitimate and procompetitive reasons why individual companies would enter into bilateral non-solicitation agreements without any broader conspiracy. For example, non-solicitation agreements encourage companies to devote employees to joint ventures because they will not be concerned that those employees will be actively poached by their business partner. Absent the agreement, companies

may abandon the collaboration, limit the participation of their employees, or take other measures that may make the collaboration less effective and innovative. And if a company perceives that its business partner is routinely attempting to lure away its employees, it is less likely to explore joint development projects, which may lead to further reduction in efficiencies and innovation. Given the benefits of non-solicitation agreements for the two parties to those agreements, the alleged bilateral agreements would stand on their own without the need for any broader conspiracy. Unlike the "parallel conduct" cases relied on by Plaintiffs, there are no allegations here—like parallel price hikes by all Defendants in the face of sharply falling costs—that make the alleged bilateral agreements "anomalous" behavior that flies in the face of expected economic decision-making. The Complaint lacks factual allegations to show that any Defendant entered into a bilateral agreement for any reason other than that specific alleged bilateral agreement.

The description of the alleged bilateral agreements as "interconnected" is not an evidentiary fact, but a label for a conclusion that is also contradicted by other allegations. Intuit's alleged agreement in June 2007 not to cold call Google's employees is not "interconnected" in any sense with Apple's alleged agreement with Adobe two years earlier. Plaintiffs' assertion that the agreements operated "over the same time period" is also inconsistent with Plaintiffs' own allegations. The alleged Pixar/Lucasfilm agreement is alleged to have begun "no later than January 2005" (Compl. ¶ 58), whereas other agreements are not alleged to have begun until more than two years later (*e.g.*, Compl. ¶ 98 (Google/Intel in September 2007).)

Likewise insufficient are Plaintiffs' allegations that Jobs and Schmidt were involved in their companies' bilateral non-solicitation agreements. That Apple's and Google's CEOs were allegedly involved in the agreements involving Apple and Google does not alter the bilateral nature of the alleged agreements. Nor is the allegation that Jobs and Schmidt both sat on Apple's board of directors evidence of a broader conspiracy. As Plaintiffs admit, overlapping board membership merely provides "an opportunity to conspire," and "an opportunity for the requisite knowledge and intent regarding the express agreements." (Opp. at 10.) The case law is clear that an opportunity to collude is not sufficient to plead a conspiracy, even where defendants are alleged to have participated in recurring industry-wide meetings or associations and have had

many opportunities to communicate directly. *See, e.g.*, *In re Citric Acid Litig.*, 191 F.3d 1090, 1103 (9th Cir. 1999) (rejecting plaintiff's attempt to infer a conspiracy from multiple meetings and telephone conversations because such meetings "do not tend to exclude the possibility of legitimate activity"); *In re Elevator Antitrust Litig.*, No. 04-1178, 2006 WL 1470994, at *10-11 (S.D.N.Y. May 30, 2006) (explaining that "the allegation that elevator company executives attend trade, industry, or social functions together is clearly insufficient to state a claim").

It does not matter, as Plaintiffs claim, that they have labeled the alleged parallel conduct itself a per se violation. (Opp. at 12-13.) As demonstrated below, the premise of this argument is wrong; non-solicitation agreements are uniformly judged under the rule of reason. But even accepting the premise, the argument fails. In *In re Iowa Ready-Mix Concrete Antitrust Litigation*, the defendants had pleaded guilty to criminal antitrust violations "as to certain *bilateral* agreements" between individual pairs of defendants. 768 F. Supp. 2d at 975 (emphasis in original). The court rejected plaintiffs' contention that these bilateral agreements were sufficient to allege a broader, "industry-wide" conspiracy involving all of the defendants. *Id.* Plaintiffs attempt to distinguish *Iowa Ready-Mix* on its facts,[2] but ignore the case's basic principle—that even criminal guilty pleas to per se unlawful bilateral agreements do not alone support an inference of an "industry-wide" conspiracy. *Id*. at 975, 978. This is precisely the problem with Plaintiffs' overarching conspiracy claim here. Similarly, in *In re Insurance Brokerage Antitrust Litigation*, the court held that allegations of similar "hub-and-spoke" conspiracies between brokers and their insurer-partners "fail to plausibly imply" a broader "global conspiracy" among all defendant brokers and insurers. 618 F.3d 300, 348 (3d Cir. 2010). (*See* Mot. at 13.) Plaintiffs do not even address *In re Insurance Brokerage*.

Plaintiffs repeatedly cite their allegation that Defendants entered into the bilateral agreements "with knowledge of the other Defendants' participation, and with the intent of

[2] Plaintiffs point to the statement in *Iowa Ready-Mix* that the plaintiffs had "not specifically alleged that any particular plaintiff purchased ready-mix concrete from any particular defendant during the class period." 768 F. Supp. 2d at 978. (Opp. at 14.) This observation only reflected the court's doubts about plaintiffs' standing. However, the court did not reach the issue of standing because plaintiffs failed to allege sufficient facts of an overarching conspiracy.

accomplishing the conspiracy's objective." (Opp. at 3, 6, 9.) These are nothing more than conclusory allegations, and *Kendall* requires that they be disregarded. 518 F.3d at 1048 (rejecting similar recitation that defendants had "knowingly, intentionally and actively participated" in the alleged conspiracy).

Plaintiffs' reliance on criminal conspiracy cases such as *Perlaza* and *Reed* is misplaced. (*See* Opp. at 11.) As these cases make clear, before a defendant may be held liable for participation in a conspiracy, the government must establish that a conspiracy existed in the first place. *United States v. Perlaza*, 439 F.3d 1149, 1177 (9th Cir. 2006) ("*once the existence of a conspiracy is established*, a defendant may be convicted of knowing participation therein") (emphasis added); *United States v. Reed*, 575 F.3d 900, 923-24 (9th Cir. 2009) (government must prove "an agreement to accomplish an illegal objective . . . . [*O*]*nce a conspiracy is established*, only a slight connection to the conspiracy is necessary . . . .") (emphasis added). Plaintiffs' Complaint fails because it does not adequately allege that *an overarching conspiracy existed at all*. Without sufficient evidence of the existence of an overarching conspiracy, it is of no import that conspiracy law requires only evidence of "knowing participation."

The civil conspiracy authorities Plaintiffs cite (*see* Opp. at 15-16) likewise make clear that the existence of a conspiracy must be established before any defendant's participation in or liability for the conspiracy is relevant. *See, e.g.*, *ABA Model Jury Instructions in Civil Antitrust Cases*, at B-14 (2005 ed.) ("*If you find that the alleged conspiracy existed*, then the acts and statements of the conspirators are binding on all those whom you find were members of the conspiracy.") (emphasis added); *Beltz Travel Serv. Inc. v. Int'l Air Transp. Ass'n*, 620 F.2d 1360, 1367 (9th Cir. 1980) ("*If Beltz can establish the existence of a conspiracy* in violation of the antitrust laws and that appellees were a part of such a conspiracy, appellees will be liable for the acts of all members of the conspiracy in furtherance of the conspiracy") (emphasis added); *In re Rubber Chems. Antitrust Litig.*, 504 F. Supp. 2d 777, 779, 789-90 (N.D. Cal. 2007) (defendant challenged only the extent of his own participation in the alleged price-fixing conspiracy, and not the existence of the alleged conspiracy). Here the Complaint fails to meet this basic prerequisite—alleging sufficient facts to support an overarching conspiracy.

The distinction between a series of alleged bilateral agreements and an overarching conspiracy is not mere semantics. The distinction goes to fundamental issues of liability, proof, and fairness. Unless Plaintiffs can establish an overarching conspiracy, there is no basis to hold Adobe, for example, liable for an alleged agreement between Lucasfilm and Pixar. *See, e.g.*, *Dickson v. Microsoft Corp.*, 309 F.3d 193, 211 (4th Cir. 2002) (where plaintiff had alleged separate bilateral conspiracies between Microsoft and three OEMs, one OEM could not be held responsible for Microsoft's acts with the other OEMs because "only acts taken in furtherance of *that* alleged conspiracy are appropriately considered in determining the adverse effects of the claimed restraints on trade, not acts of one conspirator taken in furtherance of other possible, distinct conspiracies") (emphasis added). And trying to bring claims based on separate alleged bilateral agreements in one case also would raise serious evidentiary and joinder questions. *See, e.g.*, *Wynn v. Nat'l Broad. Co.*, 234 F. Supp. 2d 1067, 1078-79 (C.D. Cal. 2002) (allegation that defendants engaged in the same "pattern and practice" of discrimination in hiring employees was not sufficient to satisfy the requirement for joinder that the claims against all defendants "arise[] out of the same transaction or occurrence"). While Plaintiffs no doubt perceive a tactical advantage in the joint and several liability that would attach to an overarching conspiracy, that is not a proper basis for lumping Defendants together into one claim. There is no "overarching conspiracy," and the Court should dismiss Plaintiffs' antitrust claims on that basis alone.

C. Plaintiffs' Argument That Non-solicitation Agreements Are "Per Se" Antitrust Violations Is Both Irrelevant and Wrong as a Matter of Law.

Plaintiffs repeatedly assert that non-solicitation agreements are judged under the per se standard rather than the rule of reason. (Opp. at 2, 13, 22-25.) To resolve this motion, the Court need not decide which standard applies. Plaintiffs' claim of an overarching conspiracy fails because they have alleged no evidentiary facts to support such a conspiracy. Nonetheless, Plaintiffs are simply wrong in their assertion that non-solicitation agreements are per se illegal.

Per se treatment is the exception. Courts have applied such treatment to only a few types of agreements—principally price-fixing, market allocation and bid rigging. As a matter of law, such conduct is unlawful regardless of its actual impact on the relevant market and any benefits it

may generate. By contrast, the rule of reason is the "presumptive form of analysis" used to judge most alleged antitrust violations. *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006). The rule of reason requires a balancing of the benefits from the challenged restraint against any alleged anticompetitive impact on the market.

Before a court may condemn a category of activity as per se illegal, it must conduct some assessment of whether there is a legitimate business justification for the collaboration. *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.* ("*BMI*"), 441 U.S. 1, 7-8, 19-20 (1979). In *BMI*, the Court identified two questions central to this assessment. First, is the practice "plainly anticompetitive" in that it "facially appears to be one that would always or almost always tend to restrict competition or decrease output." *Id.* at 8, 19-20 (citation omitted). Second, is the practice "designed to increase economic efficiency and render markets more, rather than less, competitive." *Id.* at 19-20 (internal quotation omitted). Put differently: "Per se treatment is proper only '[o]nce experience with a particular kind of restraint enables the [c]ourt to predict with confidence that the rule of reason will condemn it.'" *Cal. ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1133 (9th Cir. 2011) (en banc) (quoting *Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 344 (1982)) (rejecting per se treatment and "quick look" analysis for revenue-sharing agreement among grocery stores during union strike); *see also BMI*, 441 U.S. at 20 & n.33 (per se classification reserved for activities that, based on "considerable" judicial and economic experience, have been shown to have "no purpose except stifling of competition") (citation omitted); *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) ("*Per se* treatment is appropriate once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it.") (internal quotation omitted). The Supreme Court has cautioned against expanding the per se category to encompass new types of agreements, particularly without a careful inquiry into the procompetitive effects and justifications for those agreements. *See FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 458-59 (1986) (the Court has "been slow to . . . extend per se analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious"); *In re Online DVD Rental Antitrust Litig.*, No. M 09–2029, 2011 WL 5883772, at *10 (N.D. Cal. Nov. 23, 2011)

(declining to apply per se treatment to a promotion agreement between Netflix and Walmart based in part on "plaintiffs' inability to cite any legal authority otherwise clearly establishing the manifestly anticompetitive nature of joint promotion agreements such as the one in question").

Defendants are unaware of a single case applying the per se rule to employee non-solicitation agreements such as those alleged here. In fact, the Ninth Circuit has specifically refused to apply the per se rule to an agreement prohibiting a former executive from "raiding" his former employer's employees. *See Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 899-901 (9th Cir. 1983). Noting that such agreements "often serve legitimate business concerns," the court held broadly that "courts have had inadequate experience with noncompetition and noninterference covenants to warrant a per se categorization." *Id*. at 900. The non-solicitation agreements alleged here are significantly less restrictive than the no-hire agreement in *Aydin Corp.* because the alleged agreements here do not prohibit the hiring of any employee.

The complete absence of support for Plaintiffs' position is unsurprising. Non-solicitation practices are "dissimilar in several significant respects" from the classic per se offenses. *Union Circulation Co. v. FTC*, 241 F.2d 652, 656-57 (2d Cir. 1957). Unlike classic per se offenses, non-solicitation arrangements often serve legitimate and procompetitive business purposes, "such as preserving trade secrets and protecting investments in personnel." *See Aydin Corp.*, 718 F.2d at 900. For example, when two companies collaborate on joint venture projects, a non-solicitation agreement allows the companies to participate in the project freely and without fear that the other company is going to hire away their employees. Absent such an agreement, the procompetitive collaboration might never take place.

Given their legitimate, pro-competitive reasons, courts have uniformly held non-solicitation agreements to a rule of reason standard, rather than per se treatment. Indeed, courts have applied a rule of reason analysis even where the alleged restraint precluded the hiring of employees altogether. *See Eichorn v. AT&T Corp.*, 248 F.3d 131, 144 (3d Cir. 2001) ("no-hire agreement . . . is more appropriately analyzed under the rule of reason"). *Accord Haines v. Verimed Healthcare Network LLC*, 613 F. Supp. 2d 1133, 1136-37 (E.D. Mo. 2009); *Weisfeld v. Sun Chem. Corp.*, 210 F.R.D. 136, 138, 143 (D.N.J. 2002); *UARCO Inc. v. Lam*, 18 F. Supp. 2d

1116, 1124 (D. Haw. 1998); *Cesnik v. Chrysler Corp.*, 490 F. Supp. 859, 866-67 (M.D. Tenn. 1980).

The classification of non-solicitation agreements under the rule of reason is categorical and does not turn on whether the non-solicitation agreements were ancillary to some lawful business collaboration. *See Aydin Corp.*, 718 F.2d at 901 (rejecting argument that per se treatment of a no-hire agreement is appropriate unless the no-hire agreement was ancillary to a valid agreement). In *Union Circulation*, for example, the Second Circuit applied the rule of reason to an agreement among several magazine subscription sales agencies not to hire one another's agents for one year after termination. 241 F.2d at 657. This agreement was a flat ban on hiring, and not ancillary to any business collaboration among the agencies. *Id.* at 655-56. The court nevertheless rejected per se treatment "[b]ecause a harmful effect upon competition [was] not clearly apparent." *Id.* at 657. Forty years later, the Second Circuit reaffirmed its decision to apply the rule of reason to such activities in considering an agreement among insurance firms not to recruit and hire each others' agents. *Bogan v. Hodgkins*, 166 F.3d 509, 515 (2d Cir. 1999) ("Although such agreements fall within the ambit of antitrust law, we have nonetheless denied them *per se* treatment because a harmful effect upon competition was not clearly apparent.") (internal quotation omitted).[3]

Lacking support in the law, Plaintiffs rely heavily on the allegation found in DOJ's complaints against Defendants that the alleged bilateral agreements constitute per se violations. These allegations carry no weight. Contrary to Plaintiffs' characterization (Opp. at 24), DOJ does not make "findings"; DOJ is a plaintiff in litigation and, like any litigant, it makes allegations.

[3] Plaintiffs' cited cases are inapposite because they uniformly involve the kind of price-fixing and market allocation arrangements that have historically been accorded per se treatment; none involved employee non-solicitation agreements. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 166-67 (1940) (price-fixing conspiracy by oil companies to raise the price of gasoline through a joint program to purchase surplus gasoline on the spot market); *United States v. Brown*, 936 F.2d 1042, 1044-45 (9th Cir. 1991) (market allocation agreement by billboard companies that restricted ability to compete for each other's billboard locations); *United States v. Coop. Theatres of Ohio, Inc.*, 845 F.2d 1367, 1368-70 (6th Cir. 1988) (customer allocation agreement between booking agents not to compete for each other's customers); *Fleischman v. Albany Med. Ctr.*, 728 F. Supp. 2d 130, 137-38 (N.D.N.Y. 2010) (conspiracy among hospitals to fix wages of nurses in Albany area).

Defendants strongly disagree with DOJ's characterization of the bilateral agreements as per se violations, and no court ever adopted DOJ's argument. To the contrary, the judgments entered in the DOJ cases expressly disclaim any admission of wrongdoing or violation of law by Defendants. (Judgments at 2.) Defendants admitted only that DOJ had alleged a claim under Section 1 of the Sherman Act, not that DOJ had alleged a valid per se claim. And, of course, DOJ never alleged the "overarching conspiracy" that Plaintiffs are trying to manufacture here.[4]

In any case, Plaintiffs' own conduct in this litigation belies their argument that the alleged non-solicitation agreements constitute per se violations. Plaintiffs initially sought injunctive relief as part of their antitrust claims (Compl. ¶ 126), but dismissed that request because the DOJ consent decrees already provided the injunctive relief that Plaintiffs could have obtained. (CMC Tr. at 78:16-22; Docket No. 89.) By so agreeing, Plaintiffs conceded that the law allows Defendants to enter into non-solicitation agreements in a wide range of circumstances. (Judgments §§ V.A.1.-5.) Defendants can use non-solicitation agreements (a) as part of collaboration agreements, such as joint development, technology integration, joint ventures, joint projects such as teaming agreements, and the shared use of facilities (Judgments § V.A.5(iii)); (b) in connection with a wide range of business transactions, including mergers, acquisitions, investments, and divestitures (*id.* § V.A.2); (c) in contracts with consultants, auditors, vendors, recruiting agencies, or providers of temporary or contract employees (*id.* § V.A.3); (d) in settlement or compromise of legal disputes (*id.* § V.A.4); and (e) in employment or severance agreements with their employees (*id.* § V.A.1).

These broad categories of proper non-solicitation agreements—which Plaintiffs do not challenge—necessarily imply that the per se approach cannot be applied to the category of non-

[4] Plaintiffs' suggestion that judicial estoppel applies to the DOJ consent decrees is nonsense. (*See* Opp. at 6.) As Plaintiffs' cases make clear, judicial estoppel precludes a party from taking inconsistent positions in the same litigation only when the issue was previously litigated and relied upon. *See, e.g.*, *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase"); *Yniguez v. Arizona*, 939 F.2d 727, 738 (9th Cir. 1991) (judicial estoppel warranted because "we will not allow a party to seek an outcome directly contrary to the result he sought and obtained in the district court") (emphasis omitted). This is not the same litigation, nor are Defendants' positions inconsistent because, unlike Plaintiffs here, DOJ never alleged any "overarching conspiracy."

solicitation agreements. In other words, the fact that a wide variety of non-solicitation agreements are permissible means that any challenged non-solicitation agreement must be considered based on its pro-competitive benefits and impact on the relevant market. Such an analysis under the proper rule of reason standard would show that the attack on the alleged bilateral agreements alleged in the Complaint is meritless. The Court would have to conduct a full analysis of their procompetitive benefits, and consider factors such as the relevant market, market power, and alleged competitive harm—factors Plaintiffs try to avoid by mislabeling their claim a per se violation. Plaintiffs' claims are properly evaluated under the rule of reason.

D. Plaintiffs' Claims of Injury Are Unsupported by the Required Factual Allegations.

Plaintiffs' antitrust claims also fail because they have not alleged facts to plausibly show that they have suffered injury. An antitrust plaintiff must allege that he suffered injury regardless of whether he alleges a per se or rule of reason case. *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 341, 344 (1990) (rejecting the "suggestion that no antitrust injury need be shown where a *per se* violation is involved"; in a per se case, "the need for the antitrust injury requirement is underscored"); *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 987 n.5 (9th Cir. 2000) (in per se price-fixing case, plaintiffs "still must prove injury in fact and antitrust injury"); *City of Pittsburgh v. W. Penn Power Co.*, 147 F.3d 256, 268 (3d Cir. 1998) (plaintiff "must establish that he actually sustained injury-in-fact to business or property") (internal quotations omitted, citing Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 360, at 192 (1995)).[5] *Twombly*'s pleading standard applies equally to allegations of injury as to any other element of Plaintiffs' claims: "[A]n antitrust claimant must put forth factual 'allegations plausibly suggesting (not merely consistent with)' antitrust injury." *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 451 (6th Cir. 2007) (citing *Twombly*, 550 U.S. at 557).

[5] Plaintiffs must plead injury in fact and antitrust injury. *See Atl. Richfield*, 495 U.S. at 334 ("injury, although causally related to an antitrust violation, nevertheless will not qualify as 'antitrust injury' unless it is attributable to an anti-competitive aspect of the practice under scrutiny"). Plaintiffs' references to Article III standing and damages in their discussion of injury muddy the waters. (Opp. at 17, 20.) Defendants only challenged Plaintiffs' Article III standing to seek injunctive and declaratory relief in light of their status as Defendants' former employees.

Plaintiffs have alleged no evidentiary facts showing that they were injured by the alleged bilateral agreements, let alone the alleged "overarching conspiracy." There are no facts to suggest how Plaintiff Hariharan, for example, would have been harmed by Lucasfilm's alleged agreement with Pixar or by any overarching conspiracy among the Defendants. This is not surprising given that under the Complaint's allegations, every Defendant except Pixar (and every other employer in the world) was free to solicit Hariharan for employment. (Even Pixar was free to *hire* Hariharan if he applied or was referred by a friend or headhunter; under Plaintiffs' allegations, Pixar was restricted only from cold calling him.) Nor do any of the named Plaintiffs assert any injury unique to them; rather, they assert that they were harmed in the same way as everyone else who worked for the Defendants. But such an allegation of injury must be based on evidentiary facts and be plausible. *See NicSand*, 507 F.3d at 451.

Plaintiffs describe generally ways that cold calling *could* have an "impact on employee compensation." (Opp. at 20-21.) However, Plaintiffs fail to identify the relevant employment market(s) in which they allege compensation has been suppressed, or to allege facts showing that Defendants have power in those markets. Absent those allegations, Plaintiffs cannot plausibly allege that they have been harmed by any alleged conduct by Defendants. *See Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal.*, 190 F.3d 1051, 1057 (9th Cir. 1999) ("Antitrust injury requires the plaintiff to have suffered its injury in the market where competition is being restrained."). This requirement is distinct from the requirement that a plaintiff allege a relevant market and market power to plead the existence of an antitrust *violation* in a rule of reason case. Plaintiffs have failed to establish any plausible basis for their claim that they were *injured* by the supposed overarching conspiracy. To put it another way, Plaintiffs have shown no plausible basis to believe that the seven Defendant companies possessed the ability (i.e., market power) to control and suppress wages and employee mobility as Plaintiffs claim.

Plaintiffs' claims of injury are particularly implausible considering the multitude of high-technology companies and other employers that compete against Defendants to hire from the broad set of all salaried, non-retail employees comprising Plaintiffs' alleged class. Well over 100

million workers were employed in the United States throughout the purported class period,[6] and Plaintiffs offer no facts to suggest that these seven companies had any ability to control any segment of that enormous labor market. The Complaint does not even attempt to address this, and Plaintiffs ignore this defect in their Opposition.

Plaintiffs cite a number of cases in which employees successfully established antitrust injury. (Opp. at 18-19.) In each case, however, the plaintiffs alleged injury flowing specifically to them as a result of the alleged conspiracy. *See Roman v. Cessna Aircraft Co.*, 55 F.3d 542, 543 (10th Cir. 1995) (plaintiff had applied to work for defendant and was told that he could expect a firm offer of employment, but was subsequently turned down because defendant had agreed not to hire employees of plaintiff's former employer); *Quinonez v. Nat'l Ass'n of Sec. Dealers, Inc.*, 540 F.2d 824, 827 (5th Cir. 1976) (plaintiff sought out employment with each defendant and was rejected by each); *Nichols v. Spencer Int'l Press, Inc.*, 371 F.2d 332, 333 (7th Cir. 1967) (plaintiff was employed first by one defendant and then another defendant, but was terminated by the second defendant on account of its no-hire agreement with the first); *Doe v. Ariz. Hosp. & Healthcare Ass'n*, No. CV 07-1292, 2009 U.S. Dist. LEXIS 42871, at *8-9 (D. Ariz. Mar. 19, 2009) (plaintiffs were registered nurses who worked for and intended to continue working for defendant hospitals through nursing agencies). Plaintiffs have alleged nothing of this sort here. They do not allege that they would have applied or taken a job with another Defendant but for the alleged separate agreements or "overarching" conspiracy, or that the alleged conspiracy affected their particular employment options or choices. Plaintiffs' failure to plead any plausible injury requires dismissal of their claims. *See CBS Cos. v. Equifax, Inc.*, 561 F.3d 569, 572-73 (6th Cir. 2009) (antitrust claim properly dismissed for failure to allege facts supporting injury).[7]

[6] U.S. Dep't of Labor, Bureau of Labor Statistics, *The Employment Situation: June 2007*, http://www.bls.gov/news.release/archives/empsit_07062007.pdf (146 million workers in the United States as of June 2007, the midpoint of Plaintiffs' alleged class period).

[7] *See also Howard Hess Dental Labs., Inc. v. Dentsply Int'l, Inc.*, 602 F.3d 237, 256-57 (3d Cir. 2010) (rejecting plaintiffs' attempt to base claim on alleged bilateral agreements because they failed to allege facts to show that such individual agreements caused anticompetitive injury).

II. DEFENDANTS' ALLEGED EMPLOYEE NON-SOLICITATION AGREEMENTS DID NOT VIOLATE § 16600.

Settled California law holds that an agreement not to solicit employees "does not violate Section 16600." *See Thomas Weisel Partners LLC v. BNP Paribas*, 2010 WL 546497, at *4-6 (N.D. Cal. Feb. 10, 2010), citing *Loral Corp. v. Moyes*, 174 Cal. App. 3d 268, 279-80 (1985). An employee non-solicitation agreement does "not hamper[] [anyone] from seeking employment . . . . All they lose is the option of being contacted . . . first." *Loral*, 174 Cal. App. 3d at 279. As this Court noted in *Thomas Weisel*, "it is crucial to distinguish at the outset among the differing types of contractual provisions that might implicate a section 16600 violation." *Thomas Weisel*, 2010 WL 546497, at *3. California courts draw a clear distinction between agreements not to solicit *clients*, which in certain circumstances can restrict a person from practicing a profession, and agreements not to solicit *employees*, which cannot. *Id*. at *4-6. A prohibition on soliciting former clients can violate Section 16600 because it can inhibit a person from pursuing a lawful career, whereas agreements not to solicit employees place no restrictions on the employees' pursuit of their career. Thus, while Section 16600 does protect the right to "engag[e] in a lawful profession, trade, or business," nothing in Section 16600 or the cases interpreting it grants or protects any right of an employee to be cold called or otherwise solicited by another employer. Cal. Bus. & Prof. Code § 16600; *Thomas Weisel*, 2010 WL 546497, at *4-6. No case holds to the contrary. The Court should therefore dismiss the Section 16600 claim with prejudice.

Plaintiffs fail to distinguish this Court's decision in *Thomas Weisel*. Plaintiffs concede (Opp. at 27) that *Thomas Weisel*, *Loral*, and *Buskuhl* all stand for the proposition that an agreement of the type that Plaintiffs allege here that prohibits "raiding" or soliciting a competing employer's employees "does not violate section 16600." *Thomas Weisel*, 2010 WL 546497, at *4-6. Contrary to Plaintiffs' suggestion, those cases do not turn on whether the agreements at issue have a "legitimate purpose" (Opp. at 27). And if they did depend on some legitimate purpose, the same "anti-raiding" purpose to foster legitimate business relationships exists here.

With no response to that settled law, Plaintiffs instead attempt to brand the alleged agreements here as lacking "societal benefit" and without "pro-competitive justification." As

support for this argument, however, Plaintiffs focus entirely on cases that involve irrelevant agreements *not to compete for clients*. (Opp. at 25-28 (citing *Edwards*, *VL Systems*, and *Silguero*).) Plaintiffs' argument is off point.

Plaintiffs rely heavily on *Edwards*—a case they say "makes clear that Defendants' explicit agreements [not to solicit each other's employees] alone . . . are unlawful per se under section 16600 . . . ." (Opp. at 26:26-28.) That reliance is misplaced. *Edwards* expressly did not "address" agreements "not to solicit away" *employees* because "Edwards [did] not . . . contend that the provision of the noncompetition agreement prohibiting him from recruiting Andersen's employees violated section 16600." *Edwards v. Arthur Andersen LLP*, 44 Cal. 4th 937, 942, 946 n.4 (2008). Instead, *Edwards* held that a non-competition agreement that restricted Edwards from working for or soliciting work from any of defendant's *clients* was "invalid [under 16600] because it restrained his ability to practice his profession." *Id.* at 948.

Plaintiffs' attempt to rely on *VL Systems* is similarly misplaced. (Opp. at 28.) There, the court invalidated a contractual provision "covering not only solicitation by Star Trac, *but all hiring*" of employees. *VL Sys., Inc. v. Unisen, Inc.*, 152 Cal. App. 4th 708, 718 (2007) (emphasis added). *VL Systems* cited and discussed *Loral* in detail, but distinguished it because *Loral* "ultimately held that the provision at issue was more like a nonsolicitation or nondisclosure agreement than an invalid noncompete." *Id*. at 714. Thus, *VL Systems*, like *Edwards*, is irrelevant to the line of cases holding that Section 16600 does not reach employee non-solicitation provisions as a matter of law.[8]

The non-solicitation agreements Plaintiffs allege here are of the type that were held

[8] The other cases Plaintiffs cite are similarly inapposite. *Silguero v. Creteguard, Inc.*, 187 Cal. App. 4th 60 (2010), did not involve an employee non-solicitation agreement, but rather involved a noncompetition agreement, "which prohibited [plaintiff] 'from all sales activities for 18 months following either departure or termination.'" *Id*. at 64. *Retirement Group v. Galante*, 176 Cal. App. 4th 1226 (2009), also did not involve an employee non-solicitation agreement, but merely held, as in *Edwards*, that contracts restraining solicitation of customers violated Section 16600. *Id*. at 1238-42. Finally, in *Richmond Technologies, Inc. v. Aumtech Business Solutions*, No. 11-CV02460, 2011 WL 2607158 (N.D. Cal. July 1, 2011), the court invalidated an agreement that "broadly prohibit[ed] Aumtech India from 'enter[ing] into any agreement' with ePayware's clients or employees . . . ." *Id*. at *18. Thus, the invalid agreement in *Richmond Technologies* not only restricted solicitation of employees, but also restricted *hiring* of employees and solicitation of *clients*, unlike the alleged agreements here.

permissible in *Thomas Weisel* and *Loral*, and are clearly distinguishable from those that were alleged in *VL Systems* and *Edwards*. The alleged employee non-solicitation agreements do "not violate Section 16600" as a matter of law. *Thomas Weisel*, 2010 WL 546497, at *4.

III. PLAINTIFFS HAVE NOT ADEQUATELY PLEADED A CLAIM UNDER CALIFORNIA BUSINESS AND PROFESSIONS CODE § 17200.

Plaintiffs' Opposition does nothing to save their UCL claim. Defendants detailed in their motion how Plaintiffs had failed to establish either "unlawful, unfair or fraudulent" conduct under the UCL. (Mot. at 22-23.) Plaintiffs' Opposition does not contend that the "fraudulent" prong applies, and concedes that a UCL claim premised on "unlawful" conduct cannot survive if Plaintiffs' antitrust claims or other statutory claims fail. (Opp. at 28.) Instead, Plaintiffs contend that even in the absence of a viable antitrust claim, those same allegations can nevertheless establish a UCL violation predicated on "unfair" conduct. Plaintiffs attempt to distinguish *Chavez v. Whirlpool Corp*., 93 Cal. App. 4th 363, 375 (2001), by claiming that the *Chavez* court "did not grasp . . . that the UCL has a broader scope than the antitrust statutes." (Opp. at 29.) But countless courts, including this one, have agreed with *Chavez* and refused to allow a plaintiff to save a failed antitrust conspiracy claim by alleging that the same conduct was "unfair" under the UCL. *See Digital Sun v. Toro Co*., No. 10-CV-4567, 2011 WL 1044502, at *5 (N.D. Cal. Mar. 22, 2011) (Koh, J.) (dismissing UCL claim based on Sherman Act claim) (citing *Breakdown Servs., Ltd. v. Now Casting, Inc*., 550 F. Supp. 2d 1123, 1142 (C.D. Cal. 2007) ("in a case where plaintiff's § 17200 claim is predicated on antitrust violations that fail to withstand summary judgment, the § 17200 claim must also fail")); *see also SC Manufactured Homes, Inc. v. Liebert*, 162 Cal. App. 4th 68, 93 (2008) (failure of Cartwright Act claim means plaintiff cannot allege that the same conduct was "unfair" under the UCL) (citing *Chavez*); *In re Cipro Cases I & II*, No. D056361, 2011 WL 5120688, at *23 (Cal. Ct. App. Oct. 31, 2011) ("Our conclusion that defendants are not liable under the Cartwright Act for entering into the Cipro agreements is also dispositive of plaintiffs' causes of action for violation of the UCL and common law monopolization."); *Facebook, Inc. v. Power Ventures, Inc*., No. C08-05780, 2010 U.S. Dist. LEXIS 93517, at *44-45 (N.D. Cal. July 20, 2010) (dismissing UCL claim that was "premised on

th[e] same conduct" as claim under the Sherman Act).[9] Here, Plaintiffs contend that it is *both* an unlawful conspiracy *and* an unfair business practice for "Defendants to conspire, in secret, to deny their own employees the market value of their labor." (Opp. at 30.) Because those allegations do not support a viable antitrust conspiracy claim, their UCL claim—whether labeled as unlawful or unfair—must fail along with it.

Plaintiffs also completely ignore Defendants' showing that Plaintiffs failed to allege a "loss of money or property" required to establish standing under the UCL. (Mot. at 23-24.) Plaintiffs point to no allegations suggesting how alleged agreements between a handful of companies—only four of which involved their employers—resulted in their loss of money or property, and their UCL claim must be dismissed for this reason as well.

Finally, Plaintiffs claim, in a single conclusory sentence, that they may "seek monetary equitable remedies under the UCL" and imply that they can seek non-restitutionary disgorgement. (Opp. at 30 & n.20.) Plaintiffs suggest that such relief is not foreclosed by the California Supreme Court's decision in *Korea Supply Co*. "because that case examined only available remedies to an 'individual private plaintiff under the UCL.'" (*Id*. (quoting *Korea Supply Co. v. Lockheed Martin Corp*., 29 Cal. 4th 1134, 1144 (2003)).) But Plaintiffs cannot avoid the express language of *Korea Supply* that "disgorgement of money obtained through an unfair business practice is an available remedy in a representative action only to the extent that it constitutes restitution." *Korea Supply*, 29 Cal. 4th at 1145 .

CONCLUSION

For the reasons set forth above and in Defendants' opening brief, the Court should dismiss the Consolidated Amended Complaint.

Dated: December 2, 2011 O'MELVENY & MYERS LLP

By: /s/ Michael F. Tubach
Michael F. Tubach

[9] Plaintiffs' citation to cases allowing a UCL claim to proceed where the alleged unfair competition is premised on a statute that does not provide a private right of action are beside the point and have no bearing on Plaintiffs' claims here. *See Chabner v. United of Omaha Life Ins. Co*., 225 F.3d 1042, 1048 (9th Cir. 2000); *Ferrington v. McAfee, Inc*., No. 10-CV-01455, 2010 U.S. Dist. LEXIS 106600 (N.D. Cal. Oct. 5, 2010) (Koh, J.).

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ATTESTATION OF CONCURRENCE IN FILING

Pursuant to General Order No. 45, Section X(B) regarding signatures, I, Michael F. Tubach, hereby attest that concurrence in the filing of this Defendants' Reply in Support of Joint Motion to Dismiss the Consolidated Amended Complaint has been obtained from Defendants Intel Corp., Google Inc., Lucasfilm Ltd., Adobe Systems Inc., Intuit Inc., and Pixar.

Dated: December 2, 2011

O'MELVENY & MYERS LLP

By: /s/ Michael F. Tubach
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